

The Mother of all Earthly Laws: The Lutheran Reformation of Marriage

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Abstract

Martin Luther and his colleagues transformed the theology and law of marriage and family life in sixteenth-century Germany and Scandinavia. They replaced the medieval Catholic views of marriage as a sacrament and celibacy as a superior institution, with a new view of marriage as a natural and necessary institution for all fit adults, clergy and alike, that brought private goods to the couple and their children and public goods to the community. These new theological teachings placed marriage and family life under secular rule, and introduced legal reforms that simplified the rules of marital formation and introduced divorce for cause and remarriage at least for the innocent party.

Keywords: Martin Luther; Johann Apel; Protestant Reformation; Marriage; Social Theory; Marriage as Sacrament; The Goods of Marriage; Celibacy; Monasticism; Divorce; Remarriage; Church-State Relations; Family law

Introduction

Questions of sex, marriage and family life occupied Lutheran theologians and jurists from the very beginning of the Reformation. The leading theological lights in Germany -- Martin Luther, Philip Melanchthon, Martin Bucer, Johannes Bugenhagen, and Johannes Brenz -- all prepared lengthy tracts on the subject in the 1520s. A score of leading jurists took up legal questions of marriage in their legal opinions and commentaries, often working under the direct inspiration of Lutheran theology and theologians. Virtually every German and Scandinavian polity that converted to the Lutheran cause in the sixteenth century had new marriage laws on the books within a decade of its acceptance of the Reformation, which they then heavily revised in subsequent generations.

The reformers' early preoccupation with marriage reform was driven in part by their theology. Many of the core theological issues of the Reformation were implicated by the prevailing Catholic theology and canon law of marriage. The Church's jurisdiction over marriage was, for the reformers, a particularly flagrant example of the

¹ This Article is drawn, in part, from my Law and Protestantism: The Legal Teachings of the Lutheran Reformation (Cambridge, 2002), ch. 6 [hereafter LP] and From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition, 2d ed. (Louisville, KY, 2011), ch. 7 [hereafter FSC], and is used with permission of the publishers.

Church's usurpation of the magistrate's authority. The Catholic sacramental concept of marriage, on which the Church predicated its jurisdiction, raised deep questions of sacramental theology and biblical interpretation. The canonical prohibition on marriage of clergy and monastics stood sharply juxtaposed to Lutheran doctrines of the priesthood and of the Christian vocation. The canon law impediments to marriage, its prohibitions against complete divorce and remarriage, and its close regulations of sexuality, parenting, and education all stood in considerable tension with the reformers' interpretation of biblical teaching. That a child could enter marriage without parental permission or church consecration betrayed, in the reformers' views, basic responsibilities of family, church, and state to children. Issues of marriage doctrine and law thus implicated and epitomized many of the cardinal theological issues of the Lutheran Reformation.

The reformers' early preoccupation with marriage was also driven, in part, by their jurisprudence. The starting assumption of the budding Lutheran theories of law, society, and politics was that the earthly kingdom was governed by the three natural estates of household, church, and state. Hausvater, Gottesvater, and Landesvater; paterfamilias, patertheologicus, and paterpoliticus: these were the three natural offices through which God revealed himself and reflected his authority in the world. These three offices and orders stood equal before God and before each other. Each was called to discharge essential tasks in the earthly kingdom without impediment or interference from the other. The reform of marriage, therefore, was as important as the reform of the church and the state. Indeed, marital reform was even more urgent, for the marital household was, in the reformers' view, the "oldest," "most primal," and "most essential" of the three estates, yet the most deprecated and subordinated of the three. Marriage is the "mother of all earthly laws," Luther wrote, and the source from which the church, the state, and other earthly institutions flowed. "God has most richly blessed this estate above all others, and in addition, has bestowed on it and wrapped up in it everything in the world, to the end that this estate might be well and richly provided for. Married life therefore is no jest or presumption; it is an excellent thing and a matter of divine seriousness."²

The reformers' early preoccupation with marriage reform was also driven, in part, by their politics. A number of early leaders of the Reformation faced aggressive prosecution by the Catholic Church and its political allies for violation of the canon law of marriage and celibacy.³ Among the earliest Protestant leaders were ex-priests and ex-monastics who had forsaken their orders and vows, and often married shortly thereafter.⁴ Indeed, one of the acts of solidarity with the new Protestant cause was to

² Triglott Concordia: The Symbolic Books of the Ev. Lutheran Church German-Latin-English (St. Louis, MO, 1921), 639-641 [hereafter TC]; D. Martin Luthers Werke: Kritische Gesamtausgabe, repr. ed., 78 vols. (Weimar, 1883-1987), 30/1:152 [hereafter WA]; D. Martin Luthers Werke: Tischreden (Weimar, 1912-) 3, No. 3528 [hereafter WA TR]; Luther's Works, Jaroslav Pelikan and Helmut T. Lehmann, eds. (Philadelphia, PA, 1955-1968), 54:222-223 [hereafter LW]. See similar views in TC 611ff.; WA 49:297ff.; WA 2:734; LW 44:81ff.; TC 363-383.

³ See several examples in Martin Brecht, Martin Luther, trans. James L. Schaaf, 3 vols. (Philadelphia/Minneapolis, 1985-1993), 2:91-92 [hereafter Brecht].

⁴ One of the earliest examples was the Wittenberg wedding of ex-monk Wenzelaus Linck in April, 1523, a lavish ceremony which Luther and several other early reformers attended and celebrated. See Bernd Moeller, "Wenzel Lincks Hochzeit: Ueber Sexualität, Keuscheit und Ehe in der frühen Reformation,"

marry or divorce in open violation of the canon law and in defiance of a bishop's instructions. This was not just an instance of crime and disobedience. It was an outright scandal, particularly when an ex-monk such as Brother Martin Luther married an ex-nun such as Sister Katherine von Bora -- a prima facie case of double spiritual incest.⁵ As Catholic Church courts began to prosecute these canon law offenses, Protestant theologians and jurists rose to the defense of their co-religionists--producing a welter of briefs, letters, sermons, and pamphlets that denounced traditional norms and pronounced a new theology and law of marriage.

The Case of Johann Apel

Let's begin with a concrete case. Our case comes from 1523. This is six years after Luther posted his 95 theses, three years after his excommunication, two years after the Diet of Worms. Luther is back in Wittenberg from the Wartburg Castle. The Lutheran Reformation is gaining real revolutionary momentum in Germany and beyond.

Our case involves a priest and lawyer named Johann Apel.⁶ Apel was born and raised in Nürnberg, an important German city, still faithful to Rome at the time of the case. In 1514, Apel enrolled for theological study at the brand new University of Wittenberg, where he had some acquaintance with Luther. In 1516, Apel went to the University of Leipzig for legal studies. Like many law students in his day, he studied for a joint degree in canon law and civil law. He was awarded the doctor of both laws in 1519. After a brief apprenticeship, Apel took holy orders and swore the requisite oath of clerical celibacy. One of the strong prince-bishops of the day, Conrad, the Bishop of Würzburg and Duke of Francken, appointed Apel as a cathedral canon in 1523. Conrad also licensed Apel as an advocate in all church courts. Apel settled into his home in Würzburg and began his pastoral and legal duties.

Shortly after his appointment, Apel began romancing a nun at the nearby St. Marr cloister. (Her name is not revealed in the records.) The couple saw each other secretly for several weeks. They carried on a brisk correspondence. They began a torrid romance. She evidently became pregnant. Ultimately, the nun forsook the cloister and her vows and secretly moved in with Apel. A few weeks later, the couple were secretly married and cohabited openly as a married couple.

This was an outrage. Clerical concubinage was one thing. The surviving records show that at least three other priests in Conrad's diocese kept concubines and paid Conrad the standard concubinage tax for that privilege. Earlier that very same year of

Zeitschrift für Theologie und Kirche 97 (2000): 317. The wedding two years later of ex-monk Luther to ex-nun Katherine von Bora was considerably more modest. See Brecht, 2:195ff.

⁵ See Carter Lindberg, "The Future of a Tradition: Luther and the Family," in Dean O. Wenthe, et al., eds., All Theology is Christology: Essays in Honor of David P. Scaer (Fort Wayne, IN, 2000), 133-151, at 134.

⁶ The case is recounted in Theodore Muther, *Doctor Johann Apell. Ein Beitrag zur Geschichte der deutschen Jurisprudenz* (Königsberg: Universitäts- Buch- und Steindruckerei, 1861), 14ff., 72ff. Excerpts from the pleadings and court records are included in *Politische Reichshandel. Das ist allerhand gemeine Acten Regimentssachen und weltlichen Discursen* (Frankfurt am Main: Johan Bringern, 1614), 785-795 and in Johann Apel, *Defensio Johannis Apelli ad Episcopum Herbipolensem pro svo conivgio* (Wittenberge, 1523). The quotes that follow in this section are from these two sources. See also Martin Luther's correspondence about the case in WA Briefe, 2:353, 354, 357.

1523, another priest had fathered a child and paid the Bishop the standard cradle tax. Clerical concubinage, even fatherhood, was known and was tolerated by some obliging Catholic bishops of the day. But clerical marriage: that was an outrage, particularly when it involved both a priest and a nun, a prima facie case of double spiritual incest.

Thus, upon hearing of Apel's marriage, Bishop Conrad privately annulled the marriage and admonished Apel to confess his sin, to return his putative wife to her cloister, and to resume his clerical duties. Apel refused, insisting that his marriage, though secretly contracted, was valid. Unconvinced, the Bishop privately indicted Apel for a canon law crime and temporarily suspended him from office. Apel offered a spirited defense of his conduct in a frank letter to the Bishop.

Bishop Conrad, in response, had Apel publicly indicted in his own bishop's court, for breach of holy orders and the oath of celibacy, and for defiance of his episcopal dispensation and injunction. In a written response, Apel adduced conscience and Scripture in his defense, much like Luther had done two years before at the Diet of Worms. "I have sought only to follow the dictates of conscience and the Gospel," Apel insisted, not to defy episcopal authority and canon law. Scripture and conscience condone marriage for fit adults as "a dispensation and remedy against lust and fornication." My wife and I have availed ourselves of these godly gifts and entered and consummated our marriage "in chasteness and love."

Contrary to Scripture, Apel continued, the church's canon law commands celibacy for clerics and monastics. This introduces all manner of impurity among them. "Don't you see the fornication and the concubinage?" Apel implored Conrad. "Don't you see the defilement and the adultery in your bishopric -- with brothers spilling their seed upon the ground, upon each other, and upon many a maiden whether single or married." My alleged sin and crime of breaking "this little man-made rule of celibacy," Apel insisted, "is very slight when compared to these sins of fornication against the law of the Lord, which you, excellent father, will cover and condone if the payment is high enough." "The Word of the Lord is what will judge between you and me," Apel declared to the Bishop, and such Word commands my acquittal.

Bishop Conrad took the case under advisement. Apel took his cause to the budding Lutheran community. He sought support for his claims from Luther, Melancthon, and other Protestant leaders who had already spoken against celibacy and monasticism. He published his remarks at trial adorned with a robust preface by Martin Luther. This became an instant hot seller.

Shortly after publication of the tract, Bishop Conrad had Apel arrested and put in prison, pending further proceedings. Apel's family pleaded in vain with the Bishop to release him. The local civil magistrate twice mandated that Apel be released, again to no avail. Jurists and councilmen wrote letters of support. Even Emperor Charles V sent a brief letter urging the Bishop not to protract Apel's harsh imprisonment in violation of imperial law, but to try him and release him if found innocent.

Apel was tried three months later and was found guilty of several violations of the canon law and of heretically participating in "Luther's damned teachings." He was defrocked -- literally his clerical robes were torn from him in open court -- and he was excommunicated and evicted from the community. Thereafter Apel made his way to

Wittenberg where, at the urging of Luther and others, he was appointed to the law faculty at the University. Two years later, Apel served as one of the four witnesses to the marriage of ex-monk Martin Luther to ex-nun Katherine von Bora.

Catholic v. Protestant Views of Celibacy and Marriage

Bishop Conrad's position in the Apel case was in full compliance with the prevailing Catholic theology and canon law of marriage and celibacy, in place since the twelfth century.⁷ The medieval Church regarded marriage as "a duty for the sound and a remedy for the sick," in St. Augustine's famous phrase. Marriage was a creation of God allowing man and woman to become "two in one flesh" in order to "be fruitful and multiply" (Gen. 1:28; 2:24). Since the fall into sin, marriage had also become a remedy for lust, a channel to direct one's natural passion to the service of the community and the Church. When contracted between Christians, marriage was also a sacrament, a symbol of the indissoluble union between Christ and the Church. As a sacrament, marriage fell within the social hierarchy of the Church and was subject to its jurisdiction, its law-making power. The Church developed a comprehensive canon law of marriage after the twelfth century, administered by a vast hierarchy of church courts and officials throughout Western Christendom, stretching from Italy to Ireland, Portugal to Poland.

The Church did not regard marriage as its most exalted estate, however. Though a sacrament and a sound way of Christian living, marriage was not considered to be so spiritually edifying. Marriage was a remedy for sin, not a recipe for righteousness. Marriage was considered subordinate to celibacy, propagation less virtuous than contemplation, marital love less wholesome than spiritual love. Clerics, monastics, and other servants of the church were to forgo marriage as a condition for ecclesiastical service. Those who could not were not worthy of the Church's holy orders and offices.

This prohibition on marriage, first universally imposed on clerics and monastics by the First Lateran Council of 1123, was defended with a whole arsenal of complex arguments. The most common arguments were based on St. Paul's statements in I Corinthians 7. In this famous passage, Paul did allow that it was "better to marry than to burn" with lust. But Paul also said that it was better to remain single than to marry or remarry. "It is well for a man not to touch a woman," he wrote. For those who are married "will have worldly troubles." It is best for you to remain without marriage "to secure your undivided attention to the Lord" (1 Cor. 7:1, 28, 35). These biblical passages, heavily glossed by the early Church Fathers, provided endless medieval commentaries on and commendations of celibacy. They were buttressed by newly discovered classical Greek and Roman writings extolling celibacy for the contemplative as well as by the growing medieval celebration of the virginity of Mary as a model for pious Christian living.

Various philosophical arguments underscored the superiority of the celibate clergy to the married laity. It was a commonplace of medieval philosophy to describe God's creation as hierarchical in structure -- a vast chain of being emanating from God

⁷ See detailed account of medieval marriage theology and law, with detailed citations to the literature, in FSC, chap. 4.

and descending through various levels and layers of reality down to the smallest particulars. In this great chain of being, each creature found its place and its purpose. Each institution found its natural order and hierarchy. It was thus simply the nature of things that some persons and institutions were higher on this chain of being, some lower. It was the nature of things that some were closer and had more ready access to God, and some were further away and in need of mediation in their relationship with God. Readers of Dante's *Divine Comedy* will recognize this chain of being theory at work in Dante's vast hierarchies of hell, purgatory, and paradise.

This chain of being theory was one basis for medieval arguments for the superiority of the clergy to the laity. Clergy were simply higher on this chain of being, laity lower. The clergy were called to higher spiritual activities in the realm of grace, the laity to lower temporal activities in the realm of nature. The clergy were thus distinct from the laity in their dress, in their language, and in their livings. They were exempt from earthly obligations, such as paying civil taxes or serving in the military. They were immune from the jurisdiction of civil courts. And they were foreclosed from the natural activities of the laity, such as those of sex, marriage, and family life. These natural, corporal activities were literally beneath the clergy in ontological status and thus formally foreclosed. For a cleric or monastic to marry or to have sex was thus in a real sense to act against nature (*contra naturam*).

By contrast, Johann Apel's arguments with Bishop Conrad anticipated a good deal of the Lutheran critique of this traditional teaching of marriage and celibacy. Like their Catholic brethren, the sixteenth-century Lutheran reformers taught that marriage was created by God for the procreation of children and for the protection of couples from sexual sin. But, unlike their Catholic brethren, the reformers rejected the subordination of marriage to celibacy. We are all sinful creatures, Luther and his followers argued. Lust has pervaded the conscience of everyone. Marriage is not just an option, it is a necessity for sinful humanity. For without it, a person's distorted sexuality becomes a force capable of overthrowing the most devout conscience. A person is enticed by nature to concubinage, prostitution, masturbation, voyeurism, and sundry other sinful acts. "You cannot be without a [spouse] and remain without sin," Luther thundered from his Wittenberg pulpit. You will test your neighbor's bed unless your own marital bed is happily occupied and well used.⁸

"To spurn marriage is to act against God's calling ... and against nature's urging," Luther continued. The calling of marriage should be declined only by those who have received God's special gift of continence. "Such persons are rare, not one in a thousand [later he said one hundred thousand] for they are a special miracle of God."⁹ The Apostle Paul has identified this group as the permanently impotent and the eunuchs; very few others can claim such a unique gift.

This understanding of marriage as a protection against sin undergirded the Lutheran reformers' bitter attack on traditional rules of mandatory celibacy. To require celibacy of clerics, monks, and nuns, the reformers believed, was beyond the authority of the church and ultimately a source of great sin. Celibacy was a gift for God to give,

⁸ LW 54:31.

⁹ LW 28:912, 27-31; LW 45:18-22

not a duty for the church to impose. It was for each individual, not for the church, to decide whether he or she had received this gift. By demanding monastic vows of chastity and clerical vows of celibacy, the church was seen to be intruding on Christian freedom and contradicting Scripture, nature, and common sense. By institutionalizing and encouraging celibacy the church was seen to prey on the immature and the uncertain. By holding out food, shelter, security, and economic opportunity, the monasteries enticed poor and needy parents to oblate their minor children to a life of celibacy, regardless of whether it suited their natures. Mandatory celibacy, Luther taught, was hardly a prerequisite to true clerical service of God. Instead it led to "great whoredom and all manner of fleshly impurity and ... hearts filled with thoughts of women day and night."¹⁰

Furthermore, to impute higher spirituality and holier virtue to the celibate contemplative life was, for the reformers, contradicted by the Bible. The Bible teaches that each person must perform his or her calling with the gifts that God provides. The gifts of continence and contemplation are but two among many, and are by no means superior to the gifts of marriage and child-rearing. Each calling plays an equally important, holy, and virtuous role in the drama of redemption, and its fulfillment is a service to God. Luther concurred with the Apostle Paul that the celibate person "may better be able to preach and care for God's word." But, he immediately added: "It is God's word and the preaching which makes celibacy -- such as that of Christ and of Paul -- better than the estate of marriage. In itself, however, the celibate life is far inferior."¹¹

Not only is celibacy no better than marriage, Luther insisted; clergy are no better than laity. To make this argument cogent, Luther had to counter the medieval chain of being theory that placed celibate clergy naturally above married laity. Luther's answer lay in his complex theory of the separation of the earthly kingdom and the heavenly kingdom.¹² God has ordained two kingdoms or realms in which humanity is destined to live, the earthly kingdom and the heavenly kingdom. The earthly kingdom is the realm of creation, of natural and civic life, where a person operates primarily by reason and law. The heavenly kingdom is the realm of redemption, of spiritual and eternal life, where a person operates primarily by faith and love. These two kingdoms embrace parallel forms of righteousness and justice, government and order, truth and knowledge. They interact and depend upon each other in a variety of ways. But these two kingdoms ultimately remain distinct. The earthly kingdom is distorted by sin, and governed by the Law. The heavenly kingdom is renewed by grace and guided by the Gospel. A Christian is a citizen of both kingdoms at once and invariably comes under the distinctive government of each. As a heavenly citizen, the Christian remains free in his or her conscience, called to live fully by the light of the Word of God. But as an earthly citizen, the Christian is bound by law, and called to obey the natural orders and offices of household, state, and church that God has ordained and maintained for the governance of this earthly kingdom.

¹⁰ LW 12:98.

¹¹ LW 45:47.

¹² See LP, chapter 3.

For Luther, the fall into sin destroyed the original continuity and communion between the Creator and the creation, the natural tie between the heavenly kingdom and the earthly kingdom. There was no series of emanations of being from God to humanity. There was no stairway of merit from humanity to God. There was no purgatory. There was no heavenly hierarchy. God is present in the heavenly kingdom, and is revealed in the earthly kingdom primarily through "masks." Persons are born into the earthly kingdom, and have access to the heavenly kingdom only through faith.

Luther did not deny the traditional view that the earthly kingdom retains its natural order, despite the fall into sin. There remained, in effect, a chain of being, an order in creation that gave each creature, especially each human creature and each social institution, its proper place and purpose in this life. But, for Luther, this chain of being was horizontal, not hierarchical. Before God, all persons and all institutions in the earthly kingdom were by nature equal. Luther's earthly kingdom was a flat regime, a horizontal realm of being, with no person and no institution obstructed or mediated by any other in access to and accountability before God.

Luther thus rejected traditional teachings that the clergy were higher beings with readier access to God and God's mysteries. He rejected the notion that clergy mediated the channel of grace between the laity and God—dispensing God's grace through the sacraments and preaching, and interceding for God's grace by hearing confessions, receiving charity, and offering prayers on behalf of the laity.

Clergy and laity were fundamentally equal before God and before all others, Luther argued, sounding his famous doctrine of the priesthood of all believers. All persons were called to be priests their peers. Luther at once "laicized" the clergy and "clericized" the laity. He treated the traditional "clerical" office of preaching and teaching as just one other vocation alongside many others that a conscientious Christian could properly and freely pursue. He treated all traditional "lay" offices as forms of divine calling and priestly vocation, each providing unique opportunities for service to one's peers. Preachers and teachers in the church must carry their share of civic duties and pay their share of civil taxes just like everyone else. And they should participate in earthly activities such as marriage and family life just like everyone else.

The Goods and Gifts of Marriage in Lutheran Thought

Virtually all adults, clerical and lay alike, are called to marriage, Luther argued, because this institution offers two of the most sublime gifts that God has accorded to humanity – the gift of marital love, and the gift of children.

Luther wrote exuberantly about this first gift. "Over and above all [other loves] is marital love," he wrote. Marital love drives husband and wife to say to each other, "It is you whom I want, not what is yours. I want neither your silver nor your gold. I want neither. I want only you. I want you in your entirety, or nor at all.' All other kinds of love seek something other than the loved one: this kind wants only to have the beloved's own self completely. If Adam had not fallen, the love of bride and groom would have been the loveliest thing."¹³ "There's more to [marriage] than a union of the flesh,"

¹³ WA 2:167; see also WA 13:11; WA 17/2:350ff.

Luther wrote, although he considered sexual intimacy and warmth to be essential to the flourishing of marriage. “There must [also] be harmony with respect to patterns of life and ways of thinking.”¹⁴

The chief virtue of marriage [is] that spouses can rely upon each other and with confidence entrust everything they have on earth to each other, so that it is as safe with one's spouse as with oneself.... God's Word is actually inscribed on one's spouse. When a man looks at his wife as if she were the only woman on earth, and when a woman looks at her husband if he were the only man on earth; yes, if no king or queen, not even the sun itself sparkles any more brightly and lights up your eyes more than your own husband or wife, then right there you are face to face with God speaking. God promises to you your wife or husband, actually gives your spouse to you, saying: “The man shall be yours; the woman shall be yours. I am pleased beyond measure! Creatures earthly and heavenly are jumping for joy.” For there is no jewellery more precious than God's Word; through it you come to regard your spouse as a gift of God and, as long as you do that, you will have no regrets.¹⁵

Luther did not press these warm sentiments to the point of denying the traditional leadership of the *paterfamilias* within the marital household. Luther had no modern egalitarian theory of marriage. But Luther also did not betray these warm sentiments to the point of becoming the grim prophet of patriarchy, paternalism, and procreation *über alles* that some modern critics make him out to be. For Luther, love was a necessary and sufficient good of marriage. He supported marriages between loving couples, even those between young men and older women beyond child-bearing years or between couples who knew full well that they could have no children.¹⁶ He stressed repeatedly that husband and wife were spiritual, intellectual, and emotional “partners,” each to have regard and respect for the strengths of the other. He called his own wife Katherine respectfully “Mr. Kathy” and said more than once of her: “I am an inferior lord, she the superior; I am Aaron, she is my Moses.”¹⁷ He repeatedly told husbands and wives alike to tend to each other's spiritual, emotional, and sexual needs and to share in all aspects of child-rearing and household maintenance—from changing their children's diapers to helping their children establish their own new homes when they had grown up.¹⁸

In addition to the divine gift of love, marriage also sometimes bestowed on the couple the divine gift of children. Luther treated procreation as an act of co-creation and

¹⁴ WA TR 5, No. 5524, LW 54:444.

¹⁵ WA 34:52.5-9, 12-21 using translation of Scott Hendrix, “Luther on Marriage,” *Lutheran Quarterly* 14/3 (2000): 335-350. See also LW 31:351ff.

¹⁶ See, e.g., WA TR No. 4, No. 5212; LW 2:301ff.

¹⁷ Quoted by Ozment, *Ancestors*, 36-37. See the interesting portrait of Katherine and other Reformation women in Kirsi Irmeli Stjerna, *Women and the Reformation* (Malden, MA, 2009)

¹⁸ LW 45:39ff.

co-redemption with God. He wished for all marital couples the joy of having children, not only for their own sakes but for the sake of God as well. Childrearing, he wrote, "is the noblest and most precious work, because to God there can be nothing dearer than the salvation of souls.... [Y]ou can see how rich the estate of marriage is in good works. God has entrusted to its bosom souls begotten of its own body on whom it can lavish all manner of Christian works. Most certainly, father and mother are apostles, bishops, [and] priests to their children, for it is they who make them acquainted with the Gospel. See therefore how good and great is God's work and ordinance."¹⁹

This last image – of parents serving as priests to their children – was a new and further application of the familiar Protestant doctrine of the priesthood of all believers. It added further concreteness to the Protestant effort to soften the hard medieval distinction between a superior clergy and a lower laity: all persons are priests to their peers, and all parents are priests to their children, called to care for them in body, mind, and soul alike.

The education of children fell not only to parents. The Lutheran reformers were pioneers in creating public schools for the religious and civic education of all children, and producing a welter of catechisms, textbooks, and household manuals to assist in the same. For the reformers, each child was called to a unique Christian vocation, and it was the responsibility of the parent, priest, and prince alike to ensure that each child was given the chance to discern his or her special gifts and prepare for the particular vocation that best suited those gifts. This teaching drove the creation of public schools in early modern Protestant lands – Lutheran, Calvinist, and Anglican alike. It added a crucial public dimension to the parents' private procreation and nurture of their children. Philip Melancthon, the so-called "teacher of Germany," called the public school a "civic seminary" designed to allow families, churches, and states alike to cooperate in imbuing both civic learning and spiritual piety in children.²⁰

Marriage is not a Sacrament but a Social Estate

While marriage was a gift of God for the couple and their children, for the Lutheran reformers marriage was a social institution of the earthly kingdom, not a sacrament of the heavenly kingdom. Marriage was, in Luther's words, "a natural order," "an earthly institution," "a secular and outward thing."²¹ "No one can deny that marriage is an external, worldly matter, like clothing and food, house and property, subject to temporal authority, as the many imperial laws enacted on the subject prove."²²

To be sure, Luther agreed, marriage can symbolize the union of Christ with his Church, as St. Paul wrote in Ephesians 5:32. The sacrifices that husband and wife make for each other and for their children can express the sacrificial love of Christ on the cross. A "blessed marriage and home," can be "a true church, a chosen cloister,

¹⁹ LW 45:46.

²⁰ See LP, chap. 7.

²¹ LW 21:93.

²² LW 46:265.

yes, a paradise” on earth.²³ But these analogies and metaphors do not make marriage a sacrament on the order of baptism and the Eucharist. Sacraments are God’s gifts and signs of grace ensuring Christians of the promise of redemption which is available only to those who have faith.²⁴ Marriage carries no such promise and demands no such faith. “[N]owhere in Scripture,” writes Luther, “do we read that anyone would receive the grace of God by getting married; nor does the rite of matrimony contain any hint that that the ceremony is of divine institution.”²⁵ Scripture teaches that only baptism and the Eucharist (and perhaps penance, the early Luther allowed) confer this promise of grace. All other so-called sacraments are “mere human artifices” that the Church has created to augment its legal powers and to fill its coffers with court fees and fines.²⁶

The Catholic Church, Luther continued, has based its entire sacramental theology and canon law of marriage on a misunderstanding of Ephesians 5:32: “This is a great mystery (*mysterion*), and I am applying it to Christ and the church.” The Greek term “*mysterion*” in this passage means “mystery,” not “sacrament.” St. Jerome had just gotten it wrong a millennium before when he translated the Greek word *mysterion* as the Latin word *sacramentum* and included that in the first Latin translation of the Bible, the Vulgate. The Catholic Church has gotten it wrong ever since. In this famous Ephesians passage, Luther argued, St. Paul is simply describing the loving and sacrificial union of a Christian husband and wife as a reflection, an echo, a foretaste of the perfect mysterious union of Christ and his church. But that analogy does not make marriage a sacrament that confers sanctifying grace. The Bible is filled with analogies and parables that are designed to provide striking images to drive home lessons: “Faith is like a mustard seed”: it grows even if tiny. “The kingdom of heaven is like yeast”: it leavens even if you can’t see it. Or “the Son of man will come like a thief in the night.” So be ready at all times for his return. And the examples go on. The marriage analogy is similar: “Marital love is like the union of Christ and the church.” So be faithful and sacrificial to your spouse. Ephesians 5 is not divining a new sacrament here, Luther insisted, but driving home a lesson about marital love that much of the chapter has just explicated.²⁷

Moreover, Luther argued, it made no sense for the Catholic Church to call marriage without giving the clergy a role in this sacrament or providing a mandatory liturgy of preparation and celebration.²⁸ Neither the husband nor the wife are clerics -- nor can they be if they seek marriage in the Catholic Church. Yet, regardless of what they know or intend, both perform a sacrament just by making a present promise to marry, or making a future promise to marry and then having sex. And that purported sacramental act binds them for life. This just piles fiction upon self-serving fiction, Luther concluded. The Catholic Church forbids its clergy to marry because it is a natural association beneath them in dignity. Yet it pretends that marriage is a

²³ LW 44:85.

²⁴ See LW 36:11; TC, 310ff.

²⁵ LW 36:92-93.

²⁶ LW 36:97ff.

²⁷ LW 36:97ff.

²⁸ The Catholic Council of Trent added these clerical and liturgical requirements for Christian marriage only in 1563, well after Luther’s passing.

sacrament even if the clergy do not participate in its formation or if the marriage does not take place in the church. "This is an insult to the sacraments," Luther charged. The church's "real goal is jurisdictional not theological" in declaring marriage to be a canonical sacrament. There is no valid biblical or theological basis for this claim.²⁹

Denying the sacramental quality of marriage, had dramatic implications for how a marriage should be formed, maintained, and dissolved. First, the Lutheran reformers argued, there should be no formal religious or baptismal tests for marriage. Parties would certainly do well to marry within the faith for the sake of themselves and their children. But this is not an absolute condition. Religious differences should not be viewed as an impediment to a valid marriage that can lead to annulment, but a challenge to be more faithful within marriage and to induce proper faith in each other.

[M]arriage is an outward, bodily thing, like any other worldly undertaking. Just as I may eat, drink, sleep, walk, ride with, buy from, speak to, and deal with a heathen, Jew, Turk, or heretic, so I may also marry and continue in wedlock with him. Pay no attention to the precepts of those fools who forbid it. You will find plenty of Christians--and indeed the greater part of them--who are worse in their secret unbelief than any Jew, heathen, Turk, or heretic. A heathen is just as much a person--God's good creation--as St. Peter, St. Paul, and St. Lucy, not to speak of slack or spurious Christians.³⁰

Second, because marriage was not a sacrament, divorce and remarriage were licit, and sometimes even necessary. To be sure, the reformers, like their Catholic brethren, insisted that marriages should be stable and presumptively indissoluble. But this presumption could be overcome if one of the essential marital goods were chronically betrayed or frustrated. If there were a breach of marital love by one of the parties -- by reason of adultery, desertion, or cruelty -- the marriage was broken. The innocent spouse who could not forgive this breach could sue for divorce and remarry. If there were a failure of procreation -- by reason of sterility, incapacity, or disease discovered shortly after the wedding -- the marriage was also broken. Those spouses who could not reconcile themselves to this condition could end the marriage and at least the healthy spouse could marry another. And if there were a failure of protection from sin -- by reason of frigidity, separation, desertion, cruelty, or crime -- the marriage was again broken. If the parties could not be reconciled to regular cohabitation and consortium, they could divorce and seek another marriage.³¹ In each instance, divorce was painful, sinful, and sad, and it was a step to be taken only after ample forethought and counsel. But it was a licit, and sometimes an essential, step to take.

Third, because marriage was not a sacrament, it also did not belong primarily within the jurisdiction of the church, that is, within the law-making authority of the clergy, consistory, and congregation. Luther underscored this several times in his sermons and instructions to fellow pastors:

²⁹ LW 36:97.

³⁰ LW 45:25.

³¹ WA Br 3:288-290; WA 15:558ff.; Brecht 2:93-94.

First, we [pastors] have enough work to do in our proper office. Second, marriage is outside the church, is a civil matter, and therefore should belong to the government. Third, these cases [of marital dispute] have no limits, extend to the height, the breadth, and the depth, and produce many offences that bring disgrace to the gospel.... [W]e prefer to leave this business to civil officials. The responsibility rests on them. Only in cases of conscience should pastors give counsel to godly people. Controversies and court cases [respecting marriage] we leave to the lawyers.³²

This did not mean that marriage was beyond the pale of God's authority and law, nor that it should be beyond the influence and concern of the church. "It is sheer folly," Luther opined, to treat marriage as "nothing more than a purely human and secular state, with which God has nothing to do."³³ Questions of the formation, maintenance, and dissolution of marriage remain important public concerns, in which church officials and members must still play a key role. First, Luther and other reformers took seriously the duty of pastoral counseling in marriage disputes that raised matters of conscience. As pastors themselves, many of the reformers issued scores of private letters to parishioners who came to them for counsel. Second, theologians and preachers were to communicate to magistrates and their subjects God's law and will for marriage and the family, and press for reforms when prevailing marital laws violated God's law. As a theologian, Luther published an ample series of pamphlets and sermons on questions of marriage and marriage law, sometimes wincing about how often his interventions were still needed. Third, to aid church members in their instruction and care, and to give notice to all members of society of a couple's marriage, the local parish church clerk was to develop a publicly-available marriage registry which all married couples would be required to sign. Fourth, the pastors and teachers of the local church were to instruct and discipline the marriages of its church members by pronouncing the public bans of betrothal, by blessing and instructing the couple at their public church wedding ceremony, and by punishing sexual turpitude or egregious violations of marriage law with public reprimands, bans, or, in serious cases, excommunication. Fifth, it was incumbent upon all members of the church to participate in the spiritual upbringing and counsel of all new children, as their collective baptismal vows required.

The Legal Reformation of Marriage and Family Life

While the church still had a role to play in the guidance and governance of marriage and family life, chief legal authority, the Lutheran reformers insisted, now lay with the Christian magistrate. The civil magistrate holds his authority of God. His will is to reflect God's will. His law is to reflect God's law. His rule is to respect God's creation ordinances and institutions. His civil calling is no less spiritual than that of the church. Marriage is thus still completely subject to Godly law, but this law is now to be administered by the state, not the church.

³² WA TR 3, No. 4716, LW 54:363-364. See also WA TR 2, No. 3267, LW 54:194.

³³ LW 21:95.

This new Lutheran marital theology was something of a self-executing program of action for the creation of a new state law of the family in Lutheran lands. Just as the act of marriage came to signal a person's conversion to Protestantism, so the Marriage Act came to symbolize a political community's acceptance of Protestantism. Hundreds of new state marriage acts or ordinances emerged in Lutheran Germany and Scandinavia in the first decades of the Reformation.³⁴

These new Protestant state laws took over a number of basic principles and rules of marriage inherited from medieval canon law, classical Roman law, and ancient Mosaic law. These laws assumed: that marriage was formed by a two-step process, first of engagement then of marriage; that a valid engagement and marriage contract required the mutual consent of a man and a woman who had the age, fitness, and capacity to marry each other; that marriage was a presumptively permanent union that triggered mutual obligations of care and support for the other spouse, their children, and their dependents; that marriage often involved complex exchanges of betrothal gifts and dowry and triggered presumptive rights of dower and inheritance for widow(er)s and legitimate children; that marriages could be annulled on the discovery of various impediments and upon litigation before a proper tribunal; and that in the event of dissolution, both parents remained responsible for the maintenance and welfare of their children, and the guilty party bore heavy financial obligations to the innocent spouse and children alike. All these assumptions remained common both to the new Protestant civil laws and to the traditional Catholic canon laws of marriage.

But the Lutheran Reformation also made crucial legal changes -- beyond the critical shift of marital jurisdiction from the church to the state. Because the reformers rejected the subordination of marriage to celibacy, they rejected laws that forbade clerical and monastic marriage, that denied remarriage to those who had married a cleric or monastic, and that permitted vows of chastity to annul vows of marriage. Because they rejected the sacramental nature of marriage, the reformers rejected impediments of crime and heresy and prohibitions against divorce in the modern sense. Marriage was for them the community of the couple in the present, not their sacramental union in the life to come. Where that community was broken, for one of a number of specific reasons (such as adultery or desertion), the couple could sue for divorce. Because persons by their lustful natures were in need of God's remedy of marriage, the reformers removed numerous legal, spiritual, and consanguineous impediments to marriage not countenanced by scripture. Because of their emphasis on the Godly responsibility of the prince, the pedagogical role of the church and the family, and the priestly calling of all believers, the reformers insisted that both marriage and divorce be public. The validity of marriage promises depended upon parental consent, witnesses,

³⁴ Most of these laws are collected in Amelius L. Richter, ed., Die evangelischen Kirchenordnungen des sechszehnten Jahrhunderts, repr. ed., 2 vols. (Nieuwkoop, 1967); Emil Sehling, ed., Die evangelischen Kirchenordnungen des 16. Jahrhunderts (Leipzig, 1902-1913), vols. 1-5, continued under the same title (Tübingen, 1955-), vols. 6-16. For overviews, see Hartwig Dieterich, *Das protestantische Eherecht in Deutschland bis zur Mitte des 17. Jahrhunderts* (Munich: Claudius Verlag, 1970); Roland Kirstein, *Die Entwicklung der Sponsalienlehre und der Lehre vom Eheschluss in der deutschen protestantischen Eherechtslehre bis zu J.H. Böhmer* (Bonn: H. Bouvier, 1966), 39ff.; Walter Köhler, "Die Anfänge des protestantischen Eherechtes," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 74 (1941): 271.

church consecration and registration, and priestly instruction. Couples who wanted to divorce had to announce their intentions in the church and community and petition a civil judge to dissolve the bond. In the process of marriage formation and dissolution, therefore, the couple was subject to God's law, as appropriated in the civil law, and to God's will, as revealed in the admonitions of parents, peers, and pastors.

On account of all these changes, marriages in Lutheran lands were easier to enter and exit. Family life was more public and participatory. Children were afforded greater rights and protections. Abused spouses were given a way out of miserable homes. Divorcees and widows were given a second chance to start life anew. Ministers were married, rather than single, and better able to exemplify and implement the ideals of Christian marriage and sexual morality.

Many of the legal reforms of marriage introduced by the Lutheran reformers would remain at the heart of the Western legal tradition until the later twentieth century. But not all was sweetness and light in the Lutheran Reformation of domestic life. Yes, the Protestant reformers did outlaw monasteries and cloisters. But these reforms also ended the vocations of many single women and men, placing a new premium on the vocation of marriage. Ever since, adult Protestant singles have chafed in a sort of pastoral and theological limbo, objects of curiosity and pity, even suspicion and contempt. These are stigmata which adult singles still feel today in more conservative Protestant churches, despite the avalanche of new singles ministries to help them.

Yes, the Protestant reformers did remove clerics as mediators between God and the laity, in expression of St. Peter's teaching of the priesthood of all believers. But they ultimately interposed husbands between God and their wives, in expression of St. Paul's teaching of male headship within the home. Ever since, Protestant married women have been locked in a bitter struggle to gain fundamental equality both within the marital household and without -a struggle that has still not ended in more conservative Protestant communities today.

Luther's legal legacy therefore should be neither unduly romanticized nor unduly condemned. Those who champion Luther as the father of liberty, equality, and fraternity might do well to remember his ample penchant for elitism, statism, and chauvinism. Those who see the reformers only as belligerent allies of repression should recognize that they were also benevolent agents of welfare. Prone as he was to dialectic reasoning, and aware as he was of the inherent virtues and vices of human achievements, Luther would likely have reached a comparable assessment.